BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

JOSE ORTIZ, deceased Claimant	}
VS.	Docket No. 189,034
SOOTER EXCAVATING, INC. Respondent	Docket No. 169,034
AND	{
EMPLOYERS MUTUAL CASUALTY Insurance Carrier	

ORDER

Respondent appeals from a February 14, 1995, Preliminary Hearing Order by which Administrative Law Judge John D. Clark found claimant's average weekly wage at the time of his death to be \$300.

ISSUES

On appeal, respondent contends the Administrative Law Judge exceeded his jurisdiction by entering his Order because average weekly wage is not an issue that can be determined at a preliminary hearing in a death case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a death case involving claims by the deceased's surviving spouse and alleged surviving dependent child of the deceased and, also, a second alleged dependent child of the deceased as to whom paternity is at issue.

The issue before the Court was the decedent's average weekly wage. Initially, the respondent and its insurance carrier took the position that the decedent was not a full-time worker and was only entitled to benefits at the statutory minimum rate of \$25 per week. After the deposition of a representative of the respondent had been taken, counsel for the surviving spouse filed an Application for Preliminary Hearing, seeking a determination that the decedent's gross average weekly wage was \$300 per week and that compensation should be modified accordingly.

It is the position of the respondent and insurance carrier that average weekly wage is an issue which can only be dealt with at the time of regular hearing, following which a final determination on the issue could be made. The Appeals Board agrees. The statutory authority under which preliminary hearings are conducted is K.S.A. 44-534a(a)(1) which provides, inter alia:

"After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation."

Here there is no issue regarding medical treatment, since the injured worker is deceased and, contrary to the claimant's Application for Preliminary Hearing, there is no issue as to temporary total disability compensation. The issue involved herein is with regard to permanent benefits under K.S.A. 44-510b. Under these circumstances, the Administrative Law Judge has no authority to make a determination of the decedent's average weekly wage prior to a full regular hearing. Therefore, the Preliminary Hearing Order of the Administrative Law Judge finding the amount of claimant's average weekly wage at the time of his death is null and void.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 14, 1995, Order of Administrative Law Judge John D. Clark should be, and the same is hereby, reversed, set aside and held for naught.

IT IS SO ORDERED.
Dated this day of April 1995.
BOARD MEMBER
BOARD MEMBER
BOARD MEMBER

c: Joseph Seiwert, Wichita, KS W. Walter Craig, Wichita, KS Kendall R. Cunningham, Wichita, KS John D. Clark, Administrative Law Judge George Gomez, Director